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No. 217

In the Supreme Court of the United States

OCTOBER TERM, 1957

MORRIS W. ZACK AND SARAH ZACK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. 7a-15a) are reported at 25 T.C. 676. The order of the Court of Appeals (Pet. 5a), affirming the Tax Court's decision, has not been officially reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 5a) was entered on March 19, 1957. The order denying taxpayer's[1] petition for rehearing (Pet. 6a) was entered on March 26, 1957. The petition for a writ of certiorari was filed on June 22, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

[1] References to the "taxpayer" are to the petitioner Morris W. Zack. His wife is a party only because a joint return was filed.

QUESTION PRESENTED

Whether the record warrants the Tax Court's conclusion, affirmed by the court below, that property sold by a joint venture of which taxpayer was a member was held primarily for sale to customers in the ordinary course of business, and that consequently the sales profits were taxable as ordinary income rather than as capital gain.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does

not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. * * *.

* * * * *

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The pertinent facts, as stipulated, developed at the trial, and set forth in the Tax Court's findings of fact (Pet. 7a-13a), are as follows:

On March 20, 1948, Samuel Breakstone of Cleveland, Ohio, entered into a contract with the H. J. Johnson Company whereby the company agreed to sell Breakstone 1,565 electric bomb hoists at $15 each. The bomb hoists were devices utilized in military aircraft to lift the bombs into place. The items had been declared surplus by the Armed Forces after the conclusion of World War II. (Pet. 7a.) Breakstone, due to financial difficulties, offered to sell an interest in the bomb hoists to J. H. Tyroler of Cleveland, Ohio, who in turn contacted taxpayer, offering him an additional interest in the bomb hoists. (Pet. 8a-9a.) On April 13, 1948, Breakstone, Tyroler, and the taxpayer entered into a contract entitled "Agreement and Joint Venture" wherein it was agreed that the three parties were to share equally in the profits and losses on the bomb hoists. (Pet. 9a-10a.) Taxpayer gave $15,000 to be applied on the purchase price of the hoists. (Pet. 10a.)

The actual number of bomb hoists received from the Johnson Company was 1,499. Four hoists were sold to Gimbel Brothers at $65 each on June 18, 1948. In 1950 four hoists were sold to the Taylor Machine Company, Cleveland, Ohio, for a total of $234. In September, 1950, McGrath and Company purchased 200 bomb hoists for a price of $100 each, and the Parkersburg Junk Company purchased 1,275 bomb hoists at a price of $100 each. The remaining 16 unsold bomb hoists were eventually abandoned. (Pet. 11a.)

Prior to and subsequent to the joining of Tyroler and taxpayer as associates of Breakstone, the latter had displayed bomb hoists in his store, printed and distributed brochures illustrating and describing the hoists, and contacted prospective customers through letters and calls in person. He engaged in these various sales activities until practically all of the bomb hoists had been sold. (Pet. 10a.)

Breakstone purchased the hoists, and taxpayer and Tyroler acquired interests in the hoists, with a view to their immediate resale. Taxpayer never personally solicited customers for the hoists, but he informed salesmen employed by the M. W. Zack Metal Company, of which he was president and controlling stockholder, about the hoists and requested them to notify him when they came in contact with prospective customers for the hoists. The salesmen were furnished with sales literature by Breakstone. (Pet. 10a-11a.)

Breakstone procured Gimbel Brothers, Taylor Machine Company, and Parkersburg Junk Company as purchasers of the hoists and furnished Tyroler with the name of McGrath and Company as a prospective purchaser. (Pet. 11a.)

The Tax Court, one judge dissenting, concluded that taxpayer and his associates held the bomb hoists for sale to customers in the ordinary course of a trade or business, and that therefore the sales profits constituted ordinary income rather than capital gain from sales of capital assets. (Pet. 14a.) The Court of Appeals affirmed, one judge dissenting. (Pet. 5a.)

ARGUMENT

The question presented is one of fact, and the court below correctly affirmed the Tax Court's decision. There is no conflict of decisions, nor any other reason for further review.

1. This case presents the oft-litigated issue of whether sales profits are taxable as ordinary income or as capital gain. Section 117(a) of the Internal Revenue Code of 1939, *supra*, pp. 2-3, excludes from the definition of capital assets "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business". Whether particular property falls within the excepted category presents a question of fact in each case, no single evidentiary factor being decisive, and the trial court's conclusion is entitled to affirmance unless clearly erroneous. Among relevant factors to be considered are the intention of the taxpayer in acquiring the property, frequency and continuity of sales, advertising and other promotion of the property for sale, and any other circumstances bearing upon whether the selling activities amounted to the carrying on of a business.[2] This

[2] Cases in the Courts of Appeals involving the question presented are legion, and they hold that the question is one of fact. See, e.g., *S.E.C. Corp.* v. *United States*, 241 F. 2d 416 (C.A. 2d), certiorari denied June 10, 1957, No. 937, October Term, 1956; *Harry*

Court has denied petitions for certiorari in similar cases decided adversely to the taxpayers,[3] and because of the factual nature of the question the Government has refrained from seeking certiorari in those decided adversely to it.[4] There is no more reason for further review of this case than of the others involving the same question.

2. The record fully supports the Tax Court's conclusion that the property here involved—bomb hoists acquired by a joint venture comprised of taxpayer and two others—was held by taxpayer and his associates primarily for sale to customers in the ordinary course of business. The record shows, as the Tax Court pointed out (Pet. 10a-11a, 13a-14a), that the property was purchased for immediate resale at a profit, and not for investment; that brochures were printed and distributed advertising the property for sale; that potential customers were also personally and actively solicited; that the property was displayed in the store of one of the associates (Breakstone); that sales literature was furnished to taxpayer's salesmen; and that

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Slatkin Builders v. *Commissioner*, 235 F. 2d 189 (C.A. 6th), certiorari denied, 352 U.S. 928; *Mauldin* v. *Commissioner*, 195 F. 2d 714 (C.A. 10th); *King* v. *Commissioner*, 189 F. 2d 122 (C.A. 5th), certiorari denied, 342 U.S. 829; *Harriss* v. *Commissioner*, 143 F. 2d 279 (C.A. 2d); *Winnick* v. *Commissioner*, 223 F. 2d 266 (C.A. 6th); *Dillon* v. *Commissioner*, 213 F. 2d 218 (C.A. 8th).

[3] See, e.g., *S.E.C. Corp.* v. *United States*, *supra*; *Harry Slatkin Builders* v. *Commissioner*, *supra*; *Shearer* v. *Smyth*, 221 F. 2d 478 (C.A. 9th), certiorari denied, 350 U.S. 840; *Rubino* v. *Commissioner*, 186 F. 2d 304 (C.A. 9th), certiorari denied, 342 U.S. 814; *King* v. *Commissioner*, *supra*.

[4] See, e.g., *Philber Equipment Corp.* v. *Commissioner*, 237 F. 2d 129 (C.A. 3d); *Smith* v. *Dunn*, 224 F. 2d 353 (C.A. 5th); *Goldberg* v. *Commissioner*, 223 F. 2d 709 (C.A. 5th); *Curtis Co.* v. *Commissioner*, 232 F. 2d 167 (C.A. 3d).

these activities continued until all the hoists were sold.[5] In the light of these undisputed facts, the Tax Court was plainly justified in concluding (Pet. 14a) that the activities of taxpayer and his associates "amounted to the carrying on of a business of selling the bomb hoists", and, under familiar rules governing the scope of judicial review of the trial court's factual determinations, the Court of Appeals was equally justified in affirming. *United States* v. *Gypsum Co.*, 333 U.S. 364, 394-395. Both courts below having decided the factual issue against taxpayer, their concurrent finding is entitled to finality here. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51, and *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

3. There is no conflict. Since the question is factual, each case in this field turns, as it must, on its own record. That an appellate court may have been warranted in reversing a trial court's decision in some other case involving a similar question scarcely furnishes a basis for assuming, as does taxpayer, that the court below was obliged to reverse in this case.

Taxpayer asserts conflict on the theory (Pet. 7-8, 19-21) that the courts of appeals have evinced a "diversity" of views regarding the scope of appellate review in cases involving "the question of whether [certain] property is a capital asset." To be sure, as taxpayer

[5] Taxpayer's contention (Pet. 16-19) that the sales activities of his associates (Breakstone and Tyroler) are not attributable to him rests upon the unwarranted assumption, contrary to the record, to the findings, and indeed to the express agreement of the parties (Pet. 18, 9a-10a)—that their arrangement was that of a joint venture. A joint venture is a partnership for tax no less than for other purposes. (Section 3797(a)(2) of the Internal Revenue Code of 1939), and the acts of one member are of course binding upon the others.

notes (Pet. 7), some of the courts have characterized the issue on review as one of "ultimate fact", while others have labelled it simply as one of fact. But whatever the nomenclature used, they have uniformly recognized that the question is essentially factual in nature; none, so far as we are aware, has even suggested that the issue is simply one of law. Moreover, in view of the wide variations in "factual" content of so-called "capital gain and loss cases" (Pet. 8), some "diversity" of views regarding the scope of review in such cases would appear not only inevitable but also appropriate; no single formula can be applied across the board to so broad a category of tax litigation. At any rate, on the record here presented, it cannot be said that the court below erred in sustaining the Tax Court's decision, even assuming that the issue were characterized as one of "ultimate fact."

4. Contrary to taxpayer's contention (Pet. 13-16), the fact that one judge of the Tax Court (the lone dissenting judge) heard the case and another judge wrote the opinion for the full court does not require reversal of the Tax Court's decision. *Halle* v. *Commissioner*, 175 F. 2d 500 (C.A. 2d), certiorari denied, 338 U.S. 949; *Latchis Theatres of Keene* v. *Commissioner*, 214 F. 2d 834 (C.A. 1st); *Showell* v. *Commissioner*, 238 F. 2d 148 (C.A. 9th). This rule applies even where the findings are based upon conflicting testimony (*Latchis Theatres of Keene* v. *Commissioner*, *supra*, p. 837), and it applies *a fortiori* where as here the evidentiary facts underlying the Tax Court's decision are not in dispute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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